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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-78

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

—v.—

UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioners reply to the respective briefs of the Respondents, the Defendant Intervenors[1] Ute Indian Tribe and Ute Distribution Corporation, and the respective *amici curiae*.

[1] "Defendant Intervenors" is the proper designation for these parties, even though they purport to appear *amicus curiae*, because they entered general appearances in the trial court as defendants (A.2, R. 63). The trial court thus has jurisdiction of both of them, and it appears that they should have appeared in this Court as parties under Rule 10-4. Since we agree that they are entitled to appear, we have interposed no objection to the manner in which they have done so.

Unless otherwise indicated, the abbreviation "Br." refers to the Brief of the United States and Brief for the Securities and Exchange Commission as *amicus curiae*, who are collectively referred to as "Government."

All abbreviations follow the style of the Brief for Petitioners, and references to "App." are to the Appendix of Pertinent Statutes and Regulations at the back of the Brief for Petitioners.

SUMMARY OF ARGUMENT

I

A. A provision in a plan for distribution of assets drawn by Indian wards permitting a corporate authorized representative may not alter provisions in an Act of Congress requiring a constitution and bylaws. The Secretary may not circumvent Congress' protections for the real property by placing the realty in a corporation, and thereafter treating "interests" in the real property in the form of corporate shares as personalty. Provisions of AUC's Constitution may not alter an Act of Congress dealing with requisites of a valid public referendum.

B. The United States had a duty under the "first refusal" option contained in 25 U.S.C. § 677n, because the UDC shares were an "interest" in real property, and also because the regulations, stock certificates and forms promulgated by the Secretary, each of which had the force of statute under 25 U.S.C. § 677z, extended the "first refusal" option to the stock sales.

C. The terminated Utes may not be estopped on the theory that they "received" or "accepted" the benefits of the

UDC stock, because they in fact did not do so. The stock was retained by the Bank, and the terminated Utes are not charged with constructive knowledge of the stock or the contents of the UDC Articles.

D. The Indians did not request termination, in any realistic sense of the word, as is demonstrated in many contemporary publications on the subject by Indian leaders.

E. This is not a dispute between Indians, because no property of the Tribe is at issue and the Tribe's alleged stock holdings were purchased with full knowledge of this lawsuit, and under the influence of a guardian which was a defendant in these proceedings at the time of the purchases.

II

A. 25 U.S.C. § 677*l*(3) does not contemplate a corporate authorized representative because the section relates only to grazing and water corporations, authorizes only the transfer of *property* as distinguished from *powers*, and relates only to the unrestricted property of the individual mixed-blood rather than to restricted property such as the mineral estate. Any other construction would be inconsistent with other more specific provisions of the Termination Act. Subsequent Acts of Congress do not constitute a *nunc pro tunc* ratification of UDC because Congress did not have that situation in mind.

B. Even if a corporate authorized representative was proper under the Termination Act, as a factual matter UDC was not invested with the authorized representative powers. That conclusion follows from the fact that UDC was granted only the powers of Article V, Section 1(b) of the AUC constitution, while the authorized representative powers are provided only in Article V, Section 1 (a). Thus, UDC may manage unrestricted assets of individual members, if they con-

sent, but only AUC may manage the restricted mineral estate.

III

Jurisdiction under 25 U.S.C. § 345 is available to determine any individual interest in property set aside out of previously common Indian holdings, without regard for whether the interest is legal or beneficial. Jurisdiction is also available on the theory that the mineral estate was appurtenant to conventional allotments, title to which was confirmed to the terminated Utes under provisions of 25 U.S.C. §§ 677o(a) and 677l(2). The authorized representative powers are appurtenant to the alloted lands, and the entire mineral estate, in the same sense in which the irrigation charges adjudicated in *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970) *cert. denied* 400 U.S. 942 (1971) were appurtenant to the allotments therein.

IV

The relief prayed by Petitioners was asserted in the trial court, and fairly presented in the Petition for Certiorari. Restoration of the mineral estate should be granted, and will not result in any money judgment against the United States, which agrees that it merely holds the property for the Indians beneficially entitled to it in any event. If the minerals are restored, the Indians should then be awarded judgment against the defendants in the fraud claims in an amount equal to the payments lost during the time that these proceedings have been pending.

PRELIMINARY STATEMENT

Reply to the briefs of the respondents to the fraud claims is generally considered superfluous because they fail to discuss matters germane to the issues under review. Respondent Bank, by placing its sole reliance on *List v. Fashion Park, Inc.*, 340 F.2d 457 (2d Cir. 1964), *cert. denied sub. nom*

List v. Lerner, 382 U.S. 811 (1965), simply assumes that the case properly frames the elements to be proven herein, and fails to afford this Court any guidance on the question of whether "reliance," or any other element, may be engrafted onto the elements specified by the Exchange Act or Rule 10b-5 adopted thereunder. The observation of the Government at footnote 63 of its brief and accompanying text (Br. 67) adequately expresses Petitioners sentiments in that regard.

Respondents Bank and Gale would have this Court substitute itself in the role of a trier of the facts, though the proposition that the trial judge is the appropriate finder of the facts is so fundamental that it hardly merits statement. The Court of Appeals did not disturb the trial judge's findings, other than those dealing with the question of aiding and abetting and conspiracy (see Brief for Petitioners, pages 22-25), but merely differed with the trial court on whether the facts found were a sufficient "participation" as a matter of law (A. 584). Nevertheless, as the Government's brief makes clear, their view of the facts—even if it had been adopted by the trial judge—fails to take proper account of the provisions of the Rule dealing with "direct or indirect" conduct constituting a "device, scheme, or artifice to defraud" or an "act, practice or course of business" which operates as a fraud (Br. 58-59). What these respondents propose is that the broad language of the Rule be ignored, and that the anti-fraud provisions of the securities laws be restricted to affirmative misstatements by one who is a purchaser or seller for his own account. That is what they have in mind when they say that they did not "participate" in a particular sale or that they "purchased" but a limited number of shares, for the synoptic review of the facts by Respondent Gale clearly demonstrates that either or both of the bank employees were involved in the role of purchaser in their

own right, or as principal,[2] or as agent in the purchases by others, with respect to at least some of the transactions of every plaintiff, and they were connected with virtually every sales transaction when their functions of notary or signature guarantor are taken into account.

In short, these respondents' notion of the implications of the term "participation" is unduly restrictive, even if these factual questions were a matter under review.

It is understandable that in condensing 74 pages of findings and over 2,000 pages of evidence and testimony into the scope of a factual statement suitable to a brief, counsel will disagree over what generalizations on the facts are appropriate. Therefore, we shall not take umbrage at the accusations of "shabby falsehood" and "deliberate distortion." Invective is not, however, a substitute for legal analysis. We are content for this court to examine the trial judge's findings and the evidence to determine if our statement of the facts is accurate.

Nevertheless, as the Government's brief abundantly illustrates, it is not necessary for the Court to descend into the factual dispute to resolve the legal questions under review. The Government, which surely has no reason to stoop to "shabby falsehood," has adopted virtually every factual statement of Petitioners to which the Bank's invective relates.[3]

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[2] Richard Murray, who is shown as purchaser of the stock of Melvin Reed and Marguerite Murray Hendricks, was in fact the agent of Gale. A. 522.

[3] The statement that the Bank performed the functions of a broker, and located purchasers throughout the United States, which the Bank characterized as "inordinate exageration" (Br. for Bank 7), is adopted by the Government at Br. 55,60-62; Petitioners statement relative to the Bank working in collaboration with used car dealers, which the Bank characterized as a "falsehood" (Br. for Bank 8) represents the trial judge's finding at A. 522 and is adopted by the Government at

Of all the respondents to the fraud claims, Haslem alone has supplied this Court with a thoughtful and thorough analysis, though limited to the issue of "reliance." No reply to Respondent Haslem's argument is required, however, for his analysis leads to substantially the result urged by Petitioners: *viz.*, that since "reliance" has been construed to mean substantially the same as "materiality" – an element written into Rule 10b-5 itself – no elements other than those specified in the statute and Rule should be required.

Yet Haslem also pursues the common effort of the fraud defendants to avoid liability by dissecting the case and viewing its separate parts in isolation, as if the fact that Haslem did not devise the forms used could be considered determinative of whether he manipulated a system devised by others. We shall not belabor our view of the trial judge's findings concerning Haslem's market making activities, purchases through agents, conduct in concert with others, etc., which is set out at Brief for Petitioners pages 10-11, 16–20 and 23, but if the Court could have any doubt that he did these things we suggest a reading of his letter at E. 87-88 where he reduced to writing the broad outline of the scheme subsequent-

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Br. 56; the statement that the market was maintained by the Bank officers, which the Bank charged was "absolutely false" (Br. for Bank 8), is adopted by the Government at Br. 55 and 57; and Petitioners statement that the trial judge's findings represent findings of fraud, which the Bank described as "shabby falsehood" (Br. for Bank 10) and "deliberate distortion" (Br. for Bank 11), is repeated numerous times in the Government's argument at Br. 54-66. We are, nevertheless, startled over some of the points counsel question, such as our innocuous observation that the Roosevelt office of the bank is located on the Indian Reservation. Nothing is claimed for the statement other than that the Bank was located close to the Indians, and reference to any map will disclose that Roosevelt is in fact located at the heart of the Reservation's exterior confines. We assume that the Bank intends to say that its office is not located on Indian owned lands, with which we agree, but that hardly renders our statement "false and misleading."

ly determined by the trial judge. The claim that all of Haslem's activities were after August 27, 1964, is also disproven by his letter.

Haslem would also set up a straw man, with his suggestion that the able trial judge confused the joinder procedures with those dealing with class actions. There were no class action proceedings before Judge Christensen, however, and Haslem is mistaken in suggesting otherwise. Judge Ritter dismissed the class action *before* the case was transferred to Judge Christensen, which we consider to be an error which is not before this Court for review. The subsequent proceedings, in which a common core of conduct was determined which created a common liability, serve to illustrate that the class action (which is a procedural rather than a substantive device in any event) could and should have been employed to effect economies of judicial energy.

ARGUMENT

I

MYTHICAL ASSUMPTIONS FORM THE BASIS OF OPPOSITION TO PETITIONERS PRAYER FOR CONFIRMATION OF THEIR MINERAL ASSETS

The arguments in opposition to Petitioner's request that they be confirmed in their ownership of the mineral assets, which is contingent upon recognition of AUC as "authorized representative," are characterized by somewhat fanciful assumptions concerning the facts and law. These matters are of fundamental importance, and for lack of a more descriptive term we refer to them as "myths."

A. *Myth Number One: That BIA Can Alter Congress' Termination Plan.*

A fundamental dilemma posed by the Petition for Certiorari, which this Court undertook to review, is whether BIA

may alter Congress' termination program. The assumption that such a modification is possible is the basis for the claim that UDC is authorized by Section VII of the Plan for Distribution of the Assets of the Individual Mixed-Blood members (Plan) (See Br. 9-10).

The Plan was drawn by six representatives of the terminated Utes and their legal counsel.[4] It depends for its authority upon the fact that BIA *acquiesced* in its preparation, but it is of doubtful validity for any purpose, because it was not "ratified by a majority of said group" as the Termination Act requires.[5] In any event, the plan is of inferior importance to the Termination Act itself, and does not even rise to the dignity of a regulation promulgated by the Secretary. To say that it modified the statutory provisions would surely be strange doctrine, particularly when it was drawn by those whose legal status was that of wards.

The Government also employs this myth in an effort to circumvent the plain provision of Section 15 of the Termination Act[6] requiring the Secretary to supervise all sales of "*interests* . . . in real property" (emphasis added) until August 27, 1964. That section is one of the important provisions of the Termination Act relied upon by the trial judge, and Native American Rights Fund, *amicus curiae* (NARF), in concluding that the United States had a *statutory* duty.

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[4] See E. 147.

[5] See section 13, 25 U.S.C. §677*l*, App. ix. Resolution No. 56-66, cited at Br. 10 as authority for insertion of reference to a corporate authorized representative in the Plan, was a resolution of the Board of Directors of AUC approved by the vote of five (5) mixed-bloods. The resolution purports to confirm a "unanimous" vote of the "membership," but in fact the resolution was never ratified by a majority of the mixed-blood group, as required by 25 U.S.C. § 677*l*, and the document cited does not say otherwise, or even by a majority of the *adult* mixed-bloods. (See 25 U.S.C. §677e.) The Government evidently has no such resolution, for it refers to none.

[6] 25 U.S.C. §677n, App. xii-xiii.

No citation should be necessary for the proposition that the mineral estate of the reservation was "real property," and the fact that the UDC stock was intended to represent the terminated Utes' interest in the minerals hardly merits statement. In fact, the "warning" printed on the face of the stock certificates so declares,[7] and the Government freely admits, in another context, that "the stock . . . represented each mixed-blood's allocated share of tribal property in oil, gas and minerals . . ." (Br. 40-41). In face of these rather obvious facts, the Government nevertheless urges that though "the assets themselves thus remained subject to restrictions . . . stock in the Ute Distribution Corporation did not" (Br. 41-42). In other words, though Congress plainly declared that *interests* in real property were to be "restricted," BIA could convert those interests into *unrestricted* assets by interposing a corporation between the Indian and his property. The argument was rejected by the trial judge as frivolous, and should be so rejected now.

The maxim we have constantly recurred to bears repeating here:

> "*Congress* has the power to determine when, how and by what steps it will emancipate the Indian and whether the emancipation shall be complete or only partial."[8] (Emphasis added.)

A third application of the mythical power of BIA to overrule Congress is in relation to the authorized representative problem. In response to Petitioners objection that the formation of UDC, to the extent that it purports to act as

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[7] E. 106.

[8] Crain v. First National Bank, 324 F.2d 532, 535-536 (9th Cir. 1963). *Accord*, Menominee Tribe v. United States, 391 U.S. 404 and cases collected there. *See also* Chippewa Indians v. United States, 307 U.S. 1 (1939); Board of Commissioners v. Seber, 318 U.S. 705 (1943); United States v. Waller, 243 U.S. 452, 459-60 (1917); United States v. Bowling, 256 U.S. 484 (1921).

"authorized representative," did not comply with the requirements of Section 6 dealing with a public referendum, it is proposed that the provisions of the statute were modified by the bylaws of AUC defining a quorum for the conduct of business at a special meeting. (See Defendant Intervenors Br. 10. The Government evidently lacks confidence in this argument and did not adopt it.) The reasoning is that because AUC was properly formed, and the UDC articles were adopted at a special meeting of the membership of AUC (Defendant Intervenors Br. 10), the requirement of section 6 of the Termination Act[9] of "a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary" to validate any public referendum dealing with selection of an authorized representative was superseded by the quorum requirements of the AUC Articles. Forty-two terminated Utes would thus be permitted to bind all 490 in a manner not contemplated by Congress. Again, the argument appears frivolous and should be rejected.

B. *Myth Number Two: That the "Right of Refusal" Was Created By the UDC Articles.*

Myth number two proceeds where myth number one leaves off, and is designed to avoid the trial court's findings of Government liability. It declares that, assuming the BIA has successfully converted the realty into personalty, the "right of refusal" extended by Section 15 to all interests in real property did not apply. Thus, when the stock certificates and UDC Articles recited that the same right of refusal applied to the stock sales, the source of the right was the UDC Articles rather than the statute and could not give rise to liability. It is proposed that, therefore, this Court should simply not inquire into the question of whether the rights of the indi-

[9] 25 U.S.C. §677e, App. iii.

vidual terminated Utes were protected by the term "members of the tribe" and allow the right of these and all Indians similarly situated to fall by default. The underlying premise of this argument is false, but beyond that, it fails to even discuss important aspects of Petitioners claim that the liability was statutory.

The regulations also apply the "first refusal" option to the stock sales, and obligate the Secretary to supervise the "price and terms" of sales.[10] The regulations further require that all sales be "in accordance with the provisions set forth in the Articles of Incorporation and the certificate of stock." The forms for the sale of stock, which were promulgated by the Secretary, also extended the right of refusal option to the stock sales (see E. 41, 44). The regulations have the force of statute because they were promulgated under authority conferred upon the Secretary by Section 27 of the Termination Act.[11]

Nevertheless, even if the Secretary's extension of the first refusal option to the stock sales and the promulgation of forms and procedures in that regard was a purely voluntary act, it does not follow that the United States is excused of liability. *Indian Towing Co., Inc. v. United States*, 350 U.S. 61 (1955), and cases following it, hold that the United States may incur liability for its negligent conduct in the role of volunteer if others detrimentally rely. The trial judge concluded that such circumstances were present in this case (*e.g.* A. 533).

C. *Myth Number Three: Compliance With a Congressional Mandate May Be Excused If the Indians Consent.*

The notion that persons who are declared by Congress to be incompetent, or of limited ability, can waive compliance

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[10] 25 C.F.R. 243.8 and 243.12, App. xx.
[11] 25 U.S.C. §677z, App. xvii.

by their guardian with a Congressional mandate is advanced by Defendant Intervenors, who urge that "each [terminated Ute] *received* 10 shares of the common stock of the corporation" (Defendant Intervenors Br. 9) and that therefore "every member *accepted* the benefits of the stock . . . *knowing from the public record* that *in exchange for their stock* they had delegated to UDC authority to manage and distribute the proceeds from the mineral estate" (emphasis added) (Defendant Intervenors Br. 11). The Government does not repeat these arguments, and we assume it does not subscribe to them, but they are nevertheless implicit in the Government's review of resolutions of the "general membership" of AUC (Br. 9-11). We know of no doctrine imparting constructive knowledge of the contents of articles of incorporation, filed at the office of the Secretary of State hundreds of miles away, and Defendant Intervenors refer to none.

Nevertheless, the facts are exactly the opposite, for not a single terminated Ute ever "received" or "accepted" his stock certificate,[12] or ever even had an opportunity to do so, or to "exchange" his mineral rights for them. Indeed, it was Mr. Boyden, counsel for Defendant Intervenors, who delivered the stock certificates to the bank and instructed it that "the stock of the corporation *will not be delivered to each stockholder but will be delivered to you*"[13] (emphasis added).

We would be less than candid with this Court if we did not observe that Mr. Boyden's role in advancing these arguments is highly objectionable to Petitioners, and purposely destructive of their vital rights. The record clearly shows that he purported to act as counsel for the terminated Utes in the drafting of virtually every instrument forming a basis

[12] The trial judge so concluded at A. 516. See also the testimony at A. 287-288.

[13] E. 19.

for Mr. Boyden's claim that petitioners have unwittingly abandoned their rights.[14] Yet, Mr. Boyden now urges that every ambiguous provision which he caused to be inserted

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[14] See E. 19-20, 147, 150. Mr. Boyden, or members of his law firm, also drafted the UDC Articles, E. 1, the stock certificate, E. 106, and the Constitution and Bylaws of AUC, E. 151, and his retainer agreement is in evidence, at R. 87-90:

> "It is specifically understood that the Attorney also represents the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, composed of the full-blood members of said Tribe and it is mutually agreed that should any controversy arise involving a conflict of interest between the Affiliated Ute Citizens and the Ute Indian Tribe that may not be amicably adjusted between them, *the Attorney will represent neither the Affiliated Ute Citizens nor the Ute Indian Tribe upon the matter in controversy* and in such event the Attorney may take such action in relation to this contract, including termination thereof, as in his opinion may be required by the highest ethics of the legal profession and in good conscience." (Emphasis added).

An account summary of AUC's funds held in trust accounts 14X7178, 14X7678, 14X7179 and 14X7679, introduced by the Government on rehearing at R. ...., reflects a total of $127,536.18 paid from AUC's funds for "U.S. claims expenses." We are advised that the sum represents amounts paid to Mr. Boyden and other lawyers working in association with him for services in representing AUC.

The "cheap shot" accusation that AUC is "a rump revival of an association that has thus divested itself of all title and authority" (Defendant-Intervenors Br. 12) should also be measured against the foregoing contract, and related events. The contract was approved by BIA in October, 1960—almost two years *after* the formation of UDC—and contemplated lobbying activities on behalf of AUC in connection with the Act of September 25, 1962, cited at page 36 of the Government's brief. Thus, as late as 1962 neither Mr. Boyden nor BIA questioned that AUC retained its authority as "authorized representative." It is curious that Mr. Boyden would question AUC's standing to bring this suit, in the face of *Preston Allen v. Porter L. Merrell*, 6 Utah 2d 32, 305 P.2d 490 (1956) and *Preston Allen v. Ute Distribution Corporation*, Civil No. 4597, Fourth Judicial District Court, Duchesne County, State of Utah (1966). Preston Allen, it happens, is the President of AUC and he has joined in authorizing this suit. His counsel in *both* of the foregoing actions, which were filed by Mr. Allen as representative of all terminated Utes because he was their leader, was John S. Boyden. Moreover, the Duchesne County matter, which was concluded more than one year *after* this action was initiated,

in these documents must be construed *against* his former client's interest. Mr. Boyden, in his capacity as counsel to AUC, was instrumental in preventing the Indians from gaining actual knowledge concerning their stock, by initiating the practices which prevented them from ever seeing their certificates, yet he now advances the argument that his former clients are estopped by circumstances he himself created. The trial judge, we think quite perceptively, recognized why such an appearance by Mr. Boyden was unfair and advised him to that effect.[15] This Court need not concern itself with that aspect of the problem, but we submit that it should weigh Mr. Boyden's hand in these matters against his urging that the non-Indian beneficiaries of these practices, who he now speaks in behalf of,[16] may profit by his conduct.

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charged that UDC was squandering the assets of the terminated Utes, and Mr. Boyden sought relief against UDC on behalf of all mixed-bloods. Yet Mr. Boyden would now have this Court believe that the mixed-bloods actually favor UDC, and that those who object to it are acting against the Indian's interest.

Does AUC have authority to act for its members? Mr. Boyden certainly had no doubt when he was employed as its attorney. Is the expense of attorneys fees a burden which justifies the denial of petitions to this, or other, courts? Mr. Boyden did not think so when the fees were paid to him. Is it Mr. Boyden's position that it is better for the terminated Utes to lose their entire mineral interest to oil speculators, such as Mills Tooke of New Orleans (E. 85), than to incur the expense of counsel to recoup their rights?

[15] The trial judge explained, more effectively than we could hope to do, why an intervention such as he has engaged in herein was improper. A. 560-63.

[16] The attorney for Defendant Intervenors argues for the interest of the oil and gas companies who are lessees of the Indian lands (Br. 3, 12) and seeks preservation, *inter alia*, of the interest of the beneficiaries of the fraudulent practices. Perhaps it is a coincidence that many of them are also oil speculators. (*See e.g.* E. 85). At no point do Defendant Intervenors even hint that the individual Indian's interest should be preserved against these shrewd oil speculators, although that was the express intent of the sponsor of the Act in proposing its limitations on transfer. *See* 100 CONG. REC. Pt. 5, 6252-6253 where Senator Watkins, who was sponsor of the Ute Termination Act, so indicated in relation

Even Peter Minuit was not so brash as to undertake the acquisition of Manhattan Island by depositing stock in the Mahican's name at an Amsterdam bank. It required at least sixty Guilders in fishooks and glass beads, even in 1626,[17] and he engaged in no pretense that his acts were a protection to the Indians. Even if the Indians were highly skilled investors they could not be estopped to assert their true rights by such a ruse,[18] even if they knowingly acquiesed in the arrangement. The terminated Utes, who never saw the Articles of Incorporation or their stock certificates, plainly did not do so,[19] and considering the complex nature of the problem,

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to the companion Piaute Termination Act. Defendant Intervenors urge that Petitioners cause should be denied in the interest of "ready transfer, descent or bequething of shares," though it is plain that Congress sought to limit the transferability of all assets of the terminated Utes, and prevent transferability of the mineral assets altogether. Defendant Intervenors also pose the spectre of "heirship problems," though they must know that there is nothing peculiar or different about determining Indian heirs and if such problems developed under the Allotment Act it was because of the inaction of BIA. See CAHN, OUR BROTHERS KEEPER 88 (1970). Indeed, the very spectacle of an attorney appearing in support of termination legislation, in face of the universal condemnation of the policy by the academic and Indian communities, taxes credibility. To assume that in doing so he speaks with an Indian voice is more incredible still.

[17] *E.g.* BROWN, BURY MY HEART AT WOUNDED KNEE 4 (1970).

[18] *E.g.* Heakman v. United States, 224 U.S. 413 (1912) quoted at Brief for Petitioners, page 38.

[19] *See, e.g.* the testimony of Mrs. Hendricks, at A. 232:

> Q. I will show you a stock certificate in Plaintiffs' Exhibit 6-A, with your name on it, for ten shares bearing No. 178. Have you ever seen that before? A. Well, that was the first time I've ever seen one of those things. I never saw one before, don't know that I owned one. That's the first time I've ever seen one.
>
> Q. This is the first time you've ever seen one? A. That's right. I've never saw one before. Never have."

See also, the testimony of Mrs. Case, at A. 307-309:

> Q. Did Mr. Gale—You actually went before Mr. Gale?
>
> A. Yes, uh huh.
>
> Q. Did he tell you not to sell your stock?

as revealed in these proceedings, it is not likely that they could ever have done so.

Even if the factual basis for an estoppel were present, the Indians had no power to ratify any action not authorized by Congress in the Termination Act. The restrictive provisions were inserted because Congress believed that the terminated Utes needed supervision, at least on a limited basis. They were in a position roughly analogous to the beneficiary of a spendthrift trust. It would be a work of absurdity to permit such a person to frustrate the trustor's purposes by simply consenting to the attachment of his trust property.

D. *Myth Number Four: That the Terminated Utes Should Not Object, Because They Requested Termination.*

This Court should approach with caution the frequently repeated assertion of the Government that the terminated Utes requested either termination or the creation of UDC (Br. 33). Even if the terminated Utes had requested termination, which we deny, that would be no reason to construe

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A. No, sir.

Q. Did he tell you what "unadjudicated or unliquidated claims against the United States' were? A. No, sir.

Q. Did you know? A. No, sir. What I mean, I didn't know—not absolutely, no. Only there is money in it, or something of that sort.

Q. Did you know what the mineral rights of Ute Distribution Corporation were? A. No.

Q. Did you know anything about oil shale? A. No. I just know that it's black.

• • •

Q. Did you ever see either of the first two stock certificates in your folder? A. I seen the first two. I signed one for five shares. They took it up, got it in the bank somewheres. And, of course, I don't read very good or understand what I do read. But anyhow I picked it up and said, "I want to read what I'm signing." Mr. Gale took it out of my hand, turned it over, and said: "You wouldn't understand what you read anyhow. Sign it."

the Termination Act against their interest or refuse them protections Congress inserted in the Act for their benefit. That, after all, is the most we seek in these proceedings.

It is true that some Indians testified to Congress in favor of termination, but in the unusual circumstances of the Indian world we seriously doubt if such testimony, by a carefully selected few, constitutes consent by the entire group. The appalling bureaucracy of the Indian world, which converts those who should be its leaders (*i.e.*, tribal councils and tribal attorneys[20]) into *opponents* of the Indians interest, is detailed

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[20] At CAHN, OUR BROTHER'S KEEPER 121-23, 131 (1970) it is explained that tribal attorneys, and other experts, are effectively selected by BIA, rather than the Indians themselves:

> "A tribe must have BIA approval to secure the services of a lawyer, an engineer, an architect or other professional help. Not surprisingly, if the Bureau opposes the project it can effectively block it. Thus, when the Papago Tribe in Arizona became impatient with the mediocrity of 'experts' provided by the BIA, they sought to hire their own consultants at their own expense. The BIA threatened the tribe with total withdrawal of all BIA services." *Id.* 122-23.

> "Like certain juvenile court judges who feel it is not in the best interest of a child to provide due process, the Bureau of Indian Affairs can become highly offended when lawyers dare to tread into the benign system of care which it administers. The Bureau believes that the interests of its Indians are best served without 'outside meddling' by attorneys." *Id.* 116.

Tribal council members are also converted by BIA into opponents of the Indian's interest:

> "In many ways [the country Sioux] look at [the tribe] in the same way that many urban working class look at the police force and city government. They see it as a foreign coercive feature in their daily lives . . ." *Id.* 130.

The Indian Editorial Board, a group of nationally prominent Indians who helped compile OUR BROTHER'S KEEPER, includes Mr. Francis McKinley, a member of the "full-blood" group who Defendant Intervenors claim to represent. *Cf.* Littel v. Nakai, 344 F.2d 486 (9th Cir. 1965) *cert. denied* 382 U.S. 986 (1966); Scholder v. United States, 428 F.2d 1123 (9th Cir. 1970) *cert. denied* 400 U.S. 942 (1971) (see comments of Judge Hufstedler at 1130). Thus the true spokesmen for the

at CAHN, OUR BROTHERS KEEPER, 128-31 (1970). The vernacular of the day has even coined the term "Apple" to describe these, who are "red on the outside but white on the inside."

The myth that the Indians either requested or consented to termination is exploded at BROPHY & ABERLE, THE INDIAN: AMERICA'S UNFINISHED BUSINESS, 187-91 (1966).[21] The utter fallacy of these arguments, which are in fact the product of "economic coercion," is explained at Edgerton, *Menominee Termination: Observations On The End Of A Tribe*, 21 HUMAN ORGANIZATION 10 (1962) as to the Menominee and at

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Indian's interest are found *outside* the bureaucratic structure administered by BIA, in independent organizations such as Native American Rights Fund and the Association on American Indian Affairs, Inc., *amici curiae*, independent Indian organizations such as the National Congress of American Indians, and local Indian associations not dependent upon BIA approval of their every action, such as AUC.

[21] Brophy & Aberle is an important text for anyone who would understand the destructiveness of termination to basic Indian values. The following observations are illustrative only:

> "If there had been more time for the Indians to understand and consider these termination bills, and had they then been given the opportunity to ament [sic] or reject them without the immediate inducement of cash resulting from a division of tribal funds, the Klamath and Menominee bills at least would probably never have taken the form in which they were enacted."
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> • • •
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> "If termination is so patently unfair to Indians, why—one might well ask—have some tribes accepted it? Many divers factors have pushed tribes into such 'acceptance.' Near the top of the list one must place inducement of the funds to be distributed among individual tribesmen . . .
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> • • •
>
> "The repeated assertions at hearings on the termination acts that Indians are ready for termination are all belied by the provisions of the acts themselves, which invariably set up the safeguards usually provided for persons needing guardians. In the transitional period practically every tribal action of consequence has required the approval of the secretary. . ." *op. cit. supra.* at 190-91.

Lange, *Economic Development and Self-Determination: The Northern Ute Case*, 20 HUMAN ORGANIZATION 164 (1962) as to the Utes. The universal condemnation of termination by every Indian leader of National prominence[22] and every Indian group[23] renders suspect, at the very least, any suggestion that either these particular Indians, or the Indian community in general, favored the termination policy.

However, there is no need for this Court to descend into the morass of debate on that point, for the appropriate task, as perceptively observed by the Association on American Indian Affairs, *amicus curiae*, is to construe the law in such a fashion that it will secure the maximum protection to Indian values. Patently, the argument over whether the Indians approved or disapproved of UDC is specious, at best, for they had no power to accept or ratify a policy which had not been sanctioned by Congress.

E. *Myth Number Five: That This Is a Dispute Between Indians.*

The suggestions of Defendant Intervenors that this dispute lies between two groups of Indians, and that therefore this Court should not follow the usual practice of liberal construction in favor of the Indian, is also based on fanciful assumptions. In fact, the terminated Utes covet no interest which Congress directed be retained in the ownership of the Tribe, and none is at issue in this case. The only interests at issue, or affected by these proceedings, are those which relate to the 27.16186% of the mineral estate which the Termination Act directed be "partitioned" to the terminated Utes,[24]

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[22] *E.g.* DELORIA, JR., CUSTER DIED FOR YOUR SINS, 54-77 (1969).

[23] *Hearings on S. Concurrent Res. 26, before the Sub-Committee on Indian Affairs of the Senate Committee on Interior and Insular Affairs*, 92nd Cong., 1st Sess., July 21, 1971.

[24] Sections 1, 10, 25 U.S.C. §§677, 677i, App. i, vi. Section 10

It is proposed, however, that the Tribe's interest results from its undocumented claim that it has purchased 577 shares of the 4,900 which were issued. We have no information as to whether that claim is accurate or not, but even if true it is doubtful if a legitimate interest in this controversy is created. During the period of time in issue, and extending through the time of trial, the Tribe had not purchased a single share of stock![25] Thus, if the Tribe did purchase 577 shares it necessarily did so with full knowledge of the claims of AUC, and of the findings of the trial judge that the terminated Utes were being imposed upon. It surely would be harsh law to say that the interest of one who purchased several hundred shares of stock having such knowledge should be preserved at the expense of the several thousand shares of the terminated Utes who were imposed upon.

Even if the Tribe's 577 shares did relate to the issues of this case, its suggestion that its acquired interest in the mixed-blood's assets must be preserved at the expense of AUC is of dubious merit. If the guardian of the Tribe's funds, the BIA, caused, or even permitted, the Tribe to make such an investment—at a time when the guardian itself was a party defendant to a suit challenging the propriety of these sales—then it seems that the remedy should be against the guardian. At least no reason is suggested why every mistake made under what is a badly misguided law should be visited on the terminated Utes. Surely the United States should not be per-

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declares that "after such division, the rights or *beneficial interests* of each mixed-blood person . . . shall constitute an undivided interest in and to such property which may be inherited or bequeathed . . ." (emphasis added) thus negating any claim that the Tribe retained any interest in the terminated Utes share of the assets.

[25] The trial judge so concluded at A. 510, 530. See also defendant's exhibit F-A, which is the transfer records of the Bank up to the time of trial, which reveal that the Tribe did not own a single share.

mitted to set up after-the-fact defenses by causing its wards to engage in such transactions.

II

THERE IS NEITHER LEGAL NOR FACTUAL BASIS FOR UDC ACTING AS AUTHORIZED REPRESENTATIVE

The Government agrees that there is no square statutory authority for the formation of UDC, but attempts to surmount that conceptual problem by referring to the Plan For the Distribution of Assets of the Individual Mixed Blood Members of the Ute Indian Tribe (E. 134) (Plan), and some ambiguous general language of Section 13(3) which it claims as authority for the insertion of such a provision in the Plan. Scrutiny of the Termination Act will show that the government has overworked the provisions of Section 13(3), however, and that the authorized representative powers were never *transferred* to UDC in any event.

A. *Section 13(3) of the Termination Act Contains no such Authority.*

The statutory provision cited by the Government as authority for UDC acting as authorized representative reads as follows:

> "When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or other legal entity for any purpose, the Secretary is authorized to make such transfer." [26] (quoted at Br. 35)

It is urged that the foregoing language is sufficient because "the proceeds from the minerals are certainly assets." (De-

[26] Section 13(3), 25 U.S.C. §677*l*(3), App. xi.

fendant Intervenors Br. 17). The implications of that argument are, literally, that the "mixed-blood group" could dispose of *any* assets, to *any* "legal entity," and could do so "for any purpose." Such a pervasive design cannot be ascribed to Congress, for to do so would render superfluous the entire balance of the Termination Act. Congress' carefully contrived system of phased withdrawal of restrictions and protections could be countermanded by the Indians themselves, if the Government's construction is adopted.

The provisions of the statute which are inconsistent with the Government's position, and the policy reasons supporting Petitioner's construction of it, are analyzed in some detail at Brief for Petitioners 41-44. It remains to be observed, however, that this entirely new argument, presented for the first time in this Court, is defective because (1) it ignores the qualifying language of the subsection quoted, which limits its application to "corporations for the grazing of livestock [and] handling of water and water rights," (2) it conflicts with the plain, and more specific, declaration of Section 13(2)[27] that the mineral assets are *not* to be partitioned to corporations, (3) the *Secretary* did not hold the authorized representative powers, and therefore could not transfer them, and (4) the provision quoted could not contemplate UDC, for the corporation's powers were limited to the joint *management* of members' claims and assets. *Ownership* of assets, which is all the quoted language relates to, is not even among the powers of UDC.[28]

Section 13(3) is quoted out of context. It properly reads as follows:

> "The plan for division of assets among the members of the mixed-blood group may include:

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[27] 25 U.S.C. §677*l*(2), App. x.

[28] See E. 4.

• • •

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. [Followed by the material quoted *supra*, p. 22.]"

UDC is *not* a corporation for the "grazing of livestock" or "handling of water and water rights," and therefore Section 13(3) cannot apply to it. Moreover, the portion of the section quoted could not apply in any event, for it simply provides that the "Secretary" shall have authority to "transfer a portion of the assets" to the specified corporations.[29] The authority which must be found must be for the establishment of a corporate authorized representative, and must authorize AUC to transfer its powers to the corporation. Section 13(3) bears no relation to either of these problems.

Even if it could be assumed that the authority to "transfer" *assets* refered to in subsection 13(3) carried, by implication, the authority to transfer the authorized representative *powers*, the Government's analysis nevertheless offends the familiar doctrines that statutes must be construed in a manner giving effect to all of their constituent parts, and that internal structure (*i.e.* section headings, subdivisions or classifications) may impart meaning to ambiguous provisions.

Section 13 permits the adoption of "a plan for distribution of the assets of the mixed-blood group *to the individual members thereof.*"[30] (Emphasis added.) Neither the authorized representative powers nor the underlying minerals were to be transferred to the individual members, and therefore

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[29] The Government agrees that the mineral estate has not been transferred by the Secretary, but remains in trust with the United States.

[30] Section 13, 25 U.S.C. §677*l*, App. ix.

the section is a curious place to look for authority bearing on that subject. Moreover, Section 13(2) clearly stipulates that the minerals are *not* to be partitioned to corporations, and Section 6 declares that the authorized representative was to be selected by a constitution and bylaws. If Congress had intended that the authorized representative be selected by articles of incorporation, adopted under state law, it would have said so in Section 6. If it intended that corporations could be delegated the authorized representative powers, it would have also said so in Section 6, or at least it would have used the term "authorized representative" in section 13. If Congress had contemplated that the term "assets" would include the authorized representative powers, it would have provided in section 13(3) that AUC could make the transfer, for the power resided with AUC rather than the Secretary.

We surely cannot assume that Congress set out to trick the terminated Utes, by concealing provisions dealing with the authorized representative in such an improbable place, thus setting up the mechanics by which they would unwittingly surrender rights of infinite value.

It is not enough to say that UDC has the powers of authorized representative because its Articles of Incorporation recite that it does, nor is it of any consequence that 42 of the 490 Indians authorized the filing of the Articles of Incorporation in the general membership meeting.[31] It must also be

[31] It is as if one undertook to pre-empt the powers of any other federally chartered institution by filing articles of incorporation reciting that intent and thereafter obtaining ratification by a small minority of the persons beneficially interested in its assets. The Government's analogy to the transfer of shares in a corporation limited by law as to the transfer of its property (Br. 42) is not apt, for here the property is not held by the corporation at all but by the United States in trust for the individual terminated Utes. A purported transfer of the assets held by a trustee in bankruptcy by vote of a minority of creditors would be more appropriate. That could only be done in such a manner as Congress directs.

shown that (1) there was some statutory authority for a corporate authorized representative and (2) there was a legally sufficient transfer to it of the authorized representative powers. The claimed ratification of the corporation, by the vote of 42 persons at a special meeting of AUC, is of no effect because the statute declared that after the formation of AUC the general membership had no power to dispose of property in a public meeting, nor did it permit AUC to modify the requirements of the statute that a public referendum must be "by a majority vote of the adult mixed-blood members of the tribe," which was far in excess of 42 persons.

Defendant Intervenors thus make a mockery of the statute with their claims that this suit "seeks to strip UDC of powers and assets" (Defendant Intervenors Br. 3) and that Petitioners "endeavor to reactivate the Affiliated Ute Citizens." Clearly, UDC could not be stripped of powers which it was never invested with, nor is there any indication that AUC was ever deactivated.[32] Such arguments echo similar claims rejected by this Court in *Menominee Tribe v. United States*, 391 U.S. 404 (1968) where it was held that the Menominee's common organization was not deactivated by the termination laws.

As regards each of these contentions, we reiterate, at the expense of repetition, that "however laudable may be the

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[32] In fact, AUC has continued to function, and the BIA, Congress and the courts have recognized its right to do so. See footnote 14, *supra*. The five officers of AUC who authorized this action are the same five who were officers at the time when UDC was formed, save two directors who are since deceased and have therefore been replaced. Answers to interrogatories in *Affiliated Ute Citizens v. United States*, Docket No. 156-69, United States Court of Claims, establish that AUC has regularly held membership meetings to elect officers, Board of Directors meetings, transacted business bearing upon the "common welfare" of its members, and in many other respects continued to function with respect to the interests of its members.

motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation," [33] and he "does not have the power of an Asiatic potentate or even of a benevolent despot" but "like his wards themselves, is subject to legislative restrictions." [34]

The Indian's wardship relation must be ended in the maner provided by Congress.[35] At. Br. 34-36, the Government has presented a sumary of legislation dealing with the Utes in an effort to suggest that UDC was knowingly sanctioned, after the fact, by Congress. The citation of Mr. Boydens testimony is not convincing, for Congress clearly did not adopt it.[36] The Act of September 25, 1962, 76 Stat. 597, 598, cannot be so considered, for it was actually lobbied into existence by AUC. (See footnote 14, *supra.*) Otherwise, the truly significant passages in this history were omitted and when they are added to the Government's account it becomes quite clear that Congress did not sanction UDC in its subsequent enactments. S. REP. 2432, 84th Cong. 2nd Sess. (1956) and H. R. REP. 2744, 84th Cong. 2nd Sess (1956), which contain the legislative history concerning the 1956 amendment to Section 17 (25 U.S.C. §677p) pointedly stipulated that the amendment is "to prevent . . . unjust taxation. The section is amended in *only this one particular.*" [37] (Emphasis

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[33] Ballinger v. Frost, 216 U.S. 240, 249 (1910).

[34] United States v. Arenas, 158 F.2d 730, 747-48 (9th Cir. 1947) *cert. denied* 331 U.S. 842 (1947). *See also* United States v. Hellard, 322 U.S. 363, 368 (1944); Mullen v. Simmons, 234 U.S. 192 (1914); Starr v. Long Jim, 227 U.S. 613 (1913).

[35] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 172 (1971) quoting from United States v. Nez Perce County, 267 Fed. 495, 497-98 (D. Idaho 1917).

[36] No provisions for the disbanding of AUC were included in the Termination Act, nor is there any evidence that it did disband. The comments of Senator Watkins, on the other hand, suggest that he did not expect the mixed-blood organization to disband.

[37] To the same effect, *both reports provide* "it is intended only

added.) The legislative history concerning each of the other statutes the government refers to reflect that they were understood by Congress as being simply "an act . . . with respect to the Uintah and Ouray Reservation in Utah." It is doubtful if acts long after the corporation was formed could validate it, *nunc pro tunc*, but even if that were so the most recent event in this chain of legislative events negates any such intent. In the *only* action of Congress bearing an *unequivocal* relationship to UDC, Congress adopted legislation in 1970 refunding certain irrigation charges wrongfully assessed to the terminated Utes. At the specific request of AUC, provisions in the earlier drafts of this legislation which would have directed that refunds be paid through UDC were *deleted*, and provision was made for direct payments to the terminated Utes.[38]

B. *UDC Was Not Delegated Powers With Respect To The Mineral Estate.*

Even if it is assumed that there was some statutory authority for the formation of a corporate authorized representative, the facts do not support the conclusion that UDC was *delegated* the authorized representative powers. The Government has agreed that the restricted mineral estate was to be managed by the "authorized representative" (Br. 33) and that AUC was in fact the organization formed by the terminated Utes to perform those functions (Br. 9). The Government must also explain, therefore, how the powers were transferred to UDC. We invite careful attention to the mechanics the Government has proposed to divest AUC of its powers.

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to preserve the tax exempt status of the distributions from the trust funds held by the United States government . . ."

[38] See Section 3 of the Act of September 18, 1970, 84 Stat. 843. *Compare* Section 3 of S. 1736, 91st Cong. 2d Sess., as introduced by Senator Moss.

The Government refers to the provision of Section 6 declaring that the constitution to be adopted by the terminated Utes "may provide for the selection of authorized representatives," and then springs to the unwarranted conclusion that the powers of Article V Section 1 (b) of the AUC Constitution were duly delegated to UDC and that it thereafter was invested with the "authorized representative" powers. The reasoning is defective because the "authorized representative" powers were contained in Article V Section 1 (a)—they clearly were not contained in Article V Section 1 (b). The two sections appear at E. 155, and may be readily compared. Subsection (a) refers to the power to manage *restricted* assets such as the mineral estate, which is vested in the authorized representative. Subsection (b) refers to the power to manage "assets of mixed-blood members," which are by definition *unrestricted* assets.[39]

Contrary to the suggestions of the Government, AUC does not contend that UDC was invalidly formed. The issue, rather, is whether it was validly invested with the authorized representative powers. We agree that UDC could manage the assets of the mixed-blood members in much the same way that an insurance company, mutual fund, or bank manages the assets of its members, but confering authority on a corporation to act as a bank does not automatically invest it with any savings accounts. UDC has *authority*, but must obtain *title* from the individual Indian. The power to manage the *minerals* is an entirely different matter, for they were restricted assets not belonging to any "mixed-blood member" and only the authorized representative has that power.

The Government promotes confusion by failing to keep

[39] The Government agrees that the minerals retained their restricted status (Br. 41) and that the individual mixed-bloods property became unrestricted (Br. 8).

the two separate powers segregated. Subsection (a) is the *only* paragraph which employes the term "authorized representative," and surely the AUC would have delegated those powers to UDC if it had intended that UDC become authorized representative. Subsection (b), by contrast, does not employ the term "authorized representative." The latter power was delegated to UDC, but the former was not.

The Government evidently misconceives our position on this pivotal issue, and therefore, at the risk of belaboring the obvious, we shall cast it in syllogistic form:

> "UDC was granted only B powers. Authorized representative powers are only A powers. UDC is therefore not an authorized representative."

UDC was given the authority to manage the individual mixed-blood members property (expressed MB). UDC's authority may be expressed thus:

> "Authority to manage MB assets only was given to UDC. No MB assets are restricted assets. Therefore, UDC was not given authority to manage restricted assets."

The Government proposes to avoid its dilemma by asking this Court to constructively add the words "authorized representative" to subsection (b), and constructively delete the words limiting the subsection to assets "of the mixed-blood members." This is the same "solution" proposed in SIR WILLIAM S. GILBERT, IOLANTHE, ACT II:

> QUEEN . . . And yet (*unfolding a scroll*) the law is clear—every fairy must die who marries a mortal!
>
> CHANCELLOR. Allow me, as an old Equity draughtsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency. The

thing is really quite simple—the insertion of a single word will do it. Let it stand that every fairy shall die who *don't* marry a mortal, and there you are, out of your difficulty at once!

The second prong of the argument that UDC was delegated the powers of authorized representative is based upon the theory that, whether authorized or not, the individual Indians are estopped to protest because they have accepted the benefits of the stock, with constructive knowledge that it was intended to represent their interest in the minerals. This argument is factually incorrect for reasons set out at pages 12-17, *supra*. Even if factually correct, however, UDC would thereby become vested with no more than the *beneficial* interest, for that is all the individual Indian ever owned. The powers of authorized representative, even in that event, would remain with AUC. Even with respect to the beneficial interest, however, the argument fails because such legal fictions may not be applied to divest an Indian of his property.[40]

III

THE UNITED STATES HAS CONSENTED TO THIS SUIT

Contrary to the Government's suggestions, Petitioners have not abandoned any jurisdictional basis which may be available to them, but have focused on 25 U.S.C. § 345 because it appears peculiarly appropriate.[41] As the brief of Native American Rights Fund, *amicus curiae*, has demonstrated, there are in fact several separate bases for judisdiction, and this Court needs no citation for the proposition that

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[40] *E.g. Heckman v. United States*, 224 U.S. 413 (1912).

[41] Among other reasons, because it constitutes a waiver of immunity (Br. 29).

if facts supporting jurisdiction are present the federal courts may determine a matter, notwithstanding that the litigant did not cite or rely upon a specific jurisdictional provision.

Petitioners differ, in some minor but nevertheless important respects, with the position of NARF, *amicus curiae*. NARF has perceptively expounded the fundamental reasons why protections prescribed by the Act for the terminated Utes should not be disturbed, noting that it was the terminated Utes whose status was being changed while the full-blood Utes were not, and that therefore the protective provisions of the Act must be construed as being primarily, if not exclusively, for the benefit of the Indians being terminated.[42] NARF is also correct in urging that petitioners should have been afforded a hearing on the merits of their prayer for a pro-rata share of the minerals, but is incorrect when it echoes the Court of Appeals' suggestion that a beneficial interest would not also be within the purview of 25 U.S.C. §345. A beneficial interest, like a pro rata interest, is undeniably an interest in real property. The proper question is whether the Termination Act set aside individual interests in the previously common holdings of the tribe. Section 10[43] is unequivocal:

> "after such division the rights or beneficial interest in tribal property of each mixed-blood person . . . shall constitute an undivided interest in and to such property which may be inherited or bequeathed. . ."

A proper analysis, therefore, must focus on the *changes* wrought by the Termination Act. The change that is import-

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[42] NARF's position is supported by the history of the termination policy. See the ANN. REP. COMM., *BIA.*, 1950 at page 342 where Congresswoman Reva Beck Bosone of Utah announced the initiation of studies leading up to termination, and stressed the need for protections against exploitation of the property of the Indians to be terminated.

[43] 25 U.S.C. §677i, App. vi.

ant to 25 U.S.C. § 345 jurisdiction is that individual property rights were substituted for joint or communal property rights, as to "beneficial" title as well as legal ownership. That distinction is important in determining if the Termination Act vested the individual Indians with an interest in "any parcel of land to which they claim to be lawfully entitled," and not whether the interest be legal or beneficial.

The statement that 25 U.S.C. §345 "authorized only actions regarding allotments of land" (Br. 29) has been employed as a byword in these proceedings. Because the term "allotment" itself is of imprecise meaning and relates to a wide assortment of grants to Indians,[44] and because the statute is plainly not limited to just allotments, speaking in those terms obscures rather than aids reasoning. Nevertheless, it may be that some logic is emerging from the debate which may be of assistance to the Court, for the Government has at last undertaken to give definition to the term at Br. 30:

> "it means a tract of land set aside out of a common holding . . ."

The mineral lands in question were quite definitely "set aside out of a common holding" in the sense that each individual terminated Ute was given an "undivided interest in and to such property which may be inherited or bequeathed."

The Government concedes that 25 U.S.C. §345 is available to determine rights "appurtenant" to a conventional allotment (Br. 31), and the case for jurisdiction on that basis is even stronger. As we observed at page 40 of Brief for Petitioners, Congress even applied the term "allotment" to the interests of the terminated Utes. Moreover, the minerals in question lie under an assortment of lands, some of which

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[44] See United States v. Jackson, 280 U.S. 183, 196 (1930); Toss Weaxta, 47 I.D. 574, 577 (1920).

were allotments of the conventional sort, title to which was confirmed under Sections 16 (b) and 13 (2).[45] Thus, the Government is simply mistaken when it asserts that "the oil, gas and minerals are . . . not under any land allotted to petitioners." The Government evidently would not challenge AUC's right to bring suit with respect to these allotted lands, the mineral interest being clearly appurtenant to them, and we submit that it should also be permitted to do so with respect to the entire mineral estate, for it is appurtenant in the same sense.

The rights of AUC as "authorized representative" are also "appurtenant" rights which may be adjusted under 25 U.S.C. §345, as it has been construed by the courts. The Government has taken exception to our reading of *Scholder v. United States*, 428 F.2d 1123 (9th Cir. 1970) *cert. denied* 400 U.S. 942 (1971) in this regard, but we submit that a careful examination of its holding will bear us out. *Scholder* denied jurisdiction to control the management of an Indian irrigation company, but held that jurisdiction was available to prevent the taxing of the irrigation charges against an allotment on the theory that such an action was appurtenant to the allotment itself. It was the latter proposition which we cited the case for. In finding jurisdiction in the latter instance, but denying it in the former, Judge Hufstedler held that 25 U.S.C. §345 could be employed to adjust all rights appurtenant to an allotment or any practices which tend to jeopardize the Indian's interest. The practice of BIA disregarding AUC's rights as authorized representative is analogous to the practice of BIA in taxing improper irrigation charges to the Indian's land, which Judge Hufstedler held

[45] 25 U.S.C. §§677o(a) and 677*l*(2), App. xiii and x. The minerals also are found under lands retained in tribal ownership under Section 10, 25 U.S.C. §677i, App. vi, and lands sold pursuant to Section 9, 25 U.S.C. §677h, App. v.

within the scope of 25 U.S.C. §345. Both practices affect the Indian's interest.

The relief sought by Petitioners is not inconsistent with the line of cases cited by the Government for the proposition that the United States may not be sued with respect to lands which it holds in trust for Indians, for each of those cases deals with a quite different set of facts. The cases either do not deal with 25 U.S.C. §345,[46] do not deal with Indian property,[47] or do not deal with situations in which the individual Indian has been granted specific interests in the trust lands.[48] *Minnesota v. United States*, 305 U.S. 382 (1939) does raise some interesting points which are germane to the matter at bar, but the holding falls short of the Government's claim for it. There the state attempted to acquire jurisdiction over trust lands under a statute which granted it jurisdiction over the Indian beneficiary. In that sense, the case is distinguishable because 25 U.S.C. §345 grants jurisdiction over the United States, and not just the Indian beneficiary. The *Minnesota* case held, further, that the United States was an indispensable party, in its capacity as trustee, because the restraints on alienation had not been lifted. But, *quaere*, what if the restraints on alienation had been lifted, as in Section 10 of the Termination Act?

To the extent that it is applicable at all, *Minnesota v. United States* seems to hold against the position of the Government. This Court held that:

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[46] Motah v. United States, 402 F.2d 1 (10th Cir. 1968).

[47] Seiden v. Larson, 188 F.2d 661 (D.C. Cir. 1957) *cert. denied* 341 U.S. 950 (1957).

[48] Oregon v. Hitchcock, 202 U.S. 60 (1906); Naganab v. Hitchcock, 202 U.S. 473 (1906) (suit by Indians to control the management of trust lands by the Secretary).

> "The fee of the United States is not a dry legal title divorced from substantial powers and responsibilities with relation to the land." (*Id.* 386, n. 1).

Thus, the case seems to reject the contention of the Government that it had no duty with respect to the mineral estate, and supports the conclusion of the trial judge and the Association on American Indian Affairs, Inc., *amicus curiae*, that so long as the United States held the lands it was also bound by a limited duty of care with respect to its management of the estate.

IV

THE RELIEF PRAYED IS APPROPRIATE

The Government has suggested that the prayer of the complaint in the AUC case is somehow inconsistent with either the jurisdictional statute or the Termination Act. The prayer, in pertinent part, is as follows:

> "WHEREFORE, plaintiff prays judgment for an order of this Court distributing 27.1686 [sic] percent of the mineral estate underlying the Uintah and Ouray Reservation, Utah, to the individual 'mixed-blood' members of the plaintiff, pro rata, and determining that plaintiff association is entitled to manage said property . . ."

That prayer, by any construction, seeks only the beneficial interest the statute directed be made available to the terminates Utes, for it plainly acknowledges that management rights are divorced from the individual Indian's share. Neither could it be said that the prayer for a "pro rata" interest is inconsistent with the languge of Section 10:[49]

> "After such division the rights or beneficial interests in tribal property of each mixed-blood . . . shall con-

[49] 25 U.S.C. §677i, App. vi.

stitute an undivided interest in and to such property which may be inherited or bequeathed . . ."

Nor is the suggestion that the terminated Utes should be confirmed in their mineral estate, and receive the amount of lost dividends, an effort to "have it both ways," (Br. 48) for it must be remembered that we are dealing with wasting assets. The corporation would not be rendered useless, for it has never been the contention of AUC, and it is not now, that UDC was a complete nullity and without legal existence for any purpose. We concede, as the foregoing discussion illustrates, that UDC was validly formed *to exercise the powers specified in Article V, Section* 1(b) *of the AUC Constitution*. It may "handle the assets of the mixed-blood," including the mineral proceeds of any individual Indian who sees fit to grant UDC the right to do so. The authorized representative powers, however, may not be exercised by UDC.

In the unlikely event that some of the mixed-bloods who have retained their stock actually are in favor of continuing UDC, nothing will prevent them from doing so. Indeed, the best way to prove or disprove the contention that some or any of the mixed-bloods desire to continue UDC as their agent would be to give them an individual choice in the matter, which the statute declares that they should have. We are confident that none of them will exercise that option, however, for to do so would simply subject their interest to the unconscionable administrative expenses that the mixed-bloods have objected to for so many years.[50]

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[50]See footnote 14, *supra*. The account summary referred to in footnote 14 reflects $311,776.00 deducted from the terminated Utes funds for "administrative expenses." It is curious that the tribal attorney would suggest that this suit will jeopardize the mixed-blood interest, subject that interest to contingent attorneys fees (which is impossible, in the case of trust property), or that any mixed-bloods actually favor UDC, in view of the fact that the mixed-bloods have actually pressed legal proceedings in Utah seeking to prevent the

We urge—we beseech—this Court to recognize the practical realities of Petitioners prayer. When all of these polemics are concluded, it remains a fact that the terminated Utes seek *nothing* from the United States, save recognition of the rights which Congress declared were to be theirs. The United States lays no claim to those rights in any event, and agrees that they are held in trust for those entitled to the beneficial interest. There is, to be sure, a parallel claim bottomed on negligence, but even that might have been avoided had BIA heeded the supplications of its former wards.[51] Thus, this case remains one in which no substantial impact on the national treasury is in prospect.

The argument that Petitioners have changed their basic prayer for relief, or that the appropriate form of relief was not within the issues presented in the Petition, also does not bear analysis. It is true, as we acknowledged in the Brief for Petitioners, that the remedy of recovery of the mineral estate was not contemplated at the time the *Reyos* case was filed or when it was tried, but the AUC case was filed in a candid effort to supply that alternative remedy, at a time well in advance of entry of judgment in *Reyos*. The remedy we now seek was clearly available to and considered by the trial judge (See A. 559-560, 571-572). The two cases were consolidated for hearing in the Court of Appeals, and it was

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officers of UDC from squandering the Indian funds. These are curious arguments, also, because they come from the mouth of an attorney whose contingent attorneys fees on Indian litigation are now legend in the West. Nevertheless, as we pointed out in the Brief for Petitioners at page 55, the remedy is to devise relief which will not result in the taxation of counsel fees against the interest of the Affiliated Utes. We agree that such a result would be unfair and that such expenses should properly be charged against those who have required these proceedings to be initiated.

[51] The United States was not joined as a defendant for over a year after the filing of the complaint against the Bank (A. 1). In the

frankly declared during oral arguments that the AUC case was, in a sense, a supplemental remedy to *Reyos*. The two cases have been prosecuted in that fashion from the very inception of the AUC proceedings.

Reference to the Petition for Certiorari will disclose that while the question of damages was not specifically framed as an issue under review, the bulk of the discussion in the Petition relates to the matter of remedy. Rule 40-1(d)(1) of this Court, moreover, clearly states that the matters under review include all subsidiary questions, as the question of remedy must be considered subsidiary to the question of right to relief. This Court has repeatedly held that rules of practice and procedure are designed to promote the ends of justice, rather than defeat them, and that any legal theory of recovery fairly within the facts presented to the lower courts may be invoked by this Court.[52]

Protests of the Bank and its officers notwithstanding, the appraisal of the individual terminated Utes share of the mineral estate at in excess of $28,000 per share was not based

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meantime, Petitioners had requested that the Regional Solicitor of the Department of Interior assist them, by supplying the records necessary to prosecute their action against the Bank and furnishing any additional help which appeared appropriate. These matters are documented by Plaintiffs Exhibit 53A, E. 47. Mrs. Logan reviewed the practices of BIA which the trial judge subsequently concluded amounted to negligence and concluded that "perhaps there is an obligation to become involved," but her recommendation was evidently countermanded by her superiors. When the United States refused to even make the documents available, it was joined as a party defendant. Had Mrs. Logan's recommendation been heeded, The United States would not now be confronted with the negligence claim, for Petitioners were initially satisfied to recoup their out of pocket losses against the Bank and its officers.

[52] Silber v. United States, 370 U.S. 717, 718 (1962); United States v. Bess, 357 U.S. 51 (1958); Hormel v. Helvering, 312 U.S. 552 (1941). See also Rule 40-1(d)(2), Rules of the United States Supreme Court.

upon an unrealized speculation.[53] To the contrary, the evidence on that point was uncontroverted, based on actual sales transactions, and was corroborated by the Government's own witnesses.[54] Contrary to the urging that "there were *no* oil leases on the reservation or on the Indian lands" (Haslem Br. 32) (emphasis in original), the Government was receiving a large fortune in oil royalties for the benefit of the Indians at the time of trial (see E. 50-51), and is receiving an even larger amount today.[55] The trial judge acknowledged the mineral values in finding number 9 at A. 530, but also said that he believed the "problem is not merely to determine what an undivided mineral interest ultimately might be worth" and that therefore he could not "accept the claims of the plaintiffs that the stock should be evaluated at in excess of $28,000 per share *for the purposes of this action.*" (Emphasis added.) Thus, the trial judge did not deny either the presence or value of the minerals.

Nevertheless, this Court need not get into that debate, provided the terminated Utes are restored to their mineral rights.[56] In that event, however, it would be an unrealistic rule of damages which would not require the fraudulent parties to compensate the terminated Utes in the amount of the lost revenues during the period this litigation has been in progress. The Government itself recognizes that the damages

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[53] See Brief for Petitioners, footnote 165 at page 51. See also testimony of Dr. Christiansen at A. 386-394.

[54] See testimony of Paul Biggs, A. 426-28.

[55] It is a matter of public knowledge that oil production in the Uintah Basin subsequent to the time of trial has increased to an extent that the area of the reservation is now one of the promising oil regions in the entire country. Indeed, if Dr. Christiansen were making his appraisal today, it is certain that he would arrive at a figure in excess of $28,000 per share.

[56] If the mineral rights are *not* restored, Petitioners still contend that their loss should include the market value of the minerals.

should be "at least equal to the plaintiffs loss—that is, the difference between the price he received and the price he would have received had there been no fraudulent conduct." (Br, 58, footnote 57.) The Government may differ with us on what the proper amount is (Br. 49), but this Court need not pause over that matter, for the issue can be quickly resolved on remand.

CONCLUSION

Jurisdiction of Petitioners claims against the Government is clearly available. The rights of AUC as authorized representative should be confirmed, and the individual terminated Utes should be granted damages equal to the amount of distributions they have been deprived of by reason of the wrongful payment of their funds to UDC, together with their counsel fees and the costs of maintaining this action.

Respectfully submitted,

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